A

DR MICHAEL JEYAKUMAR DEVARAJ

v.

PEGUAM NEGARA MALAYSIA

B

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ZULKEFLI MAKINUDIN CJ (MALAYA)
HASHIM YUSOFF FCJ
SURIYADI HALIM OMAR FCJ
C AHMAD MAAROP FCJ
[CIVIL APPEAL NO: 01-9-04-2012(W)]
16 JANUARY 2013

D ***ADMINISTRATIVE LAW:*** *Judicial review - Application for - Leave to institute judicial review proceedings - Appellant a Member of Parliament - Issues on disbursement of Special Constituency Allocation - Whether issues involved policy consideration and management prerogative of Executive - Separation of powers - Whether courts must be wary of unduly extending its judicial arms to policy matters exclusively within* E *domain of Executive - Whether court was in position to evaluate issues raised by appellant - Whether appellant had arguable case - Whether issues raised were not judicially reviewable*

F The appellant was the Member of Parliament for the Sungai Siput constituency in the State of Perak. On 9 July 2010, the appellant wrote to the Director of the Perak State Development Office ('second respondent') applying for funds from the Special Constituency Allocation for, *inter alia*, various projects and activities in the Sungai Siput constituency. However, feeling G aggrieved with the second respondent's response, the appellant filed an application in the High Court for leave to institute judicial review proceedings under O. 53 of the Rules of the High Court 1980 seeking, *inter alia*, a declaration that the decision of the second respondent was in breach of art. 8(1) of the Federal Constitution and as a result, was unconstitutional and void. The H trial judge allowed the appellant's application for leave and held that there were issues that went to the merits of the application which ought to be resolved at the hearing of the substantive motion. On the contrary, the Attorney General's appeal to the Court of Appeal was allowed as it was held, *inter alia*, that the I disbursement of the Special Constituency Allocation involved policy consideration and management prerogative and thus, the appellant's complain was legally unsustainable and not judicially reviewable. Dissatisfied, the appellant appealed to this court. The

appellant contended that his application for the Special Constituency Allocation was rejected by the second respondent and in doing so, the Director-General of the Implementation Coordination Unit of the Prime Minister's Department, the first respondent and/or the second respondent had exercised his/their discretion wrongly. One of the issue that arose for consideration was whether such exercise of discretion was amenable to judicial review.

Held (dismissing appeal)
Per Raus Sharif PCA delivering the judgment of the court:

(1) The Executive's discretion, whether by statute or prerogative is amenable to judicial review. However, whether such discretion is amenable to judicial review is dependent on the facts of each case. Further, courts must be wary of unduly extending its judicial arms to policy matters which were exclusively within the domain of the Executive. Unwarranted usurpation and transgression by the Judiciary into the realm of the Executive and *vice versa* would bring about disrepute to our system of government which upholds the separation of powers between the three main components, *vis-à-vis*, the Executive, the Legislature and the Judiciary. (paras 16 & 20)

(2) On the facts, the disbursement of the Special Constituency Allocation was a policy matter which was not within the purview of the courts. The court was in no position to evaluate the qualifications in the application for the Special Constituency Allocation and to determine or decide on the policy made by the Executive. This court took cognizance of the fact that government policies emanate after consideration of a number of technical factors which were often non-legal, and judges do not possess the necessary information and expertise to evaluate these non-legal factors and to pass judgment on the appropriateness or adequacy of a particular policy. (para 18)

(3) The second respondent had clearly explained as to why he decided the way he did with regard to the distribution of the Special Constituency Allocation for the Sungai Siput constituency. Clearly, what was decided by the second respondent hinged on matters which related to policy and thus, the court dissuaded itself from entering into the realm which belonged to the Executive. Further, the supporting documents exhibited by the appellant clearly showed that the appellant had no arguable case. (paras 20 & 23)

(4) The decision or exercise of discretion sought to be reviewed under judicial review based on policy consideration or management prerogative may be determined at the leave stage itself. It was not a requirement that the court must only decide on the issue after hearing all the evidence at the substantive motion for judicial review. Further, the justiciability of such decision is dependent on the particular facts of the case. On the facts herein, the issues raised in the notice of motion for leave were not judicially reviewable and hence, not justifiable. (paras 24 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah Ahli Parlimen bagi kawasan Sungai Siput di Negeri Perak. Pada 9 Julai 2010, perayu telah menulis kepada Pengarah Perbadanan Kemajuan Negeri Perak ('responden kedua') memohon untuk dana daripada Peruntukan Khas Kawasan bagi, antara lain, beberapa projek dan aktiviti di kawasan Sungai Siput. Walau bagaimanapun, terkilan dengan balasan responden kedua, perayu telah memfailkan permohonan di Mahkamah Tinggi untuk kebenaran memulakan prosiding semakan kehakiman di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 menuntut, antara lain, satu deklarasi bahawa keputusan responden kedua adalah memungkiri fasal 8(1) Perlembagaan Persekutuan dan sebagai akibatnya, adalah tidak berperlembagaan dan terbatal. Hakim bicara membenarkan permohonan perayu bagi kebenaran dan memutuskan bahawa terdapat isu-isu yang berkaitan dengan merit permohonan di mana ia sepatutnya diselesaikan semasa pendengaran usul substantif. Sebaliknya, rayuan Peguam Negara ke Mahkamah Rayuan dibenarkan di mana ianya diputuskan, antara lain, bahawa pengagihan Peruntukan Khas Kawasan melibatkan pertimbangan polisi dan pengurusan prerogatif dan oleh itu, aduan perayu tidak boleh dikekalkan dari segi undang-undang dan tidak boleh disemak secara kehakiman. Tidak puas hati, perayu merayu ke mahkamah ini. Perayu berhujah bahawa permohonan beliau bagi Peruntukan Khas Kawasan telah ditolak oleh responden kedua dan dalam berbuat sedemikian, Ketua Pengarah Unit Penyelarasan Pelaksanaan dari Jabatan Perdana Menteri, responden pertama dan/atau responden kedua telah melaksanakan budi bicara mereka dengan salah. Salah satu daripada isu yang dibangkitkan untuk pertimbangan adalah sama ada pelaksanaan budi bicara sebegitu tertakluk kepada semakan kehakiman.

Diputuskan (menolak rayuan)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Budi bicara Eksekutif, sama ada melalui statut ataupun prerogatif adalah tertakluk kepada semakan kehakiman. Walau bagaimanapun, sama ada budi bicara sebegitu adalah tertakluk kepada semakan kehakiman bergantung kepada fakta setiap kes. Tambahan, mahkamah mestilah berhati-hati daripada melanjutkan fungsi kehakimannya kepada perkara-perkara polisi yang secara eksklusifnya berada di dalam hal ehwal Eksekutif. Perampasan dan pelanggaran tidak wajar oleh Kehakiman ke dalam bidang kuasa Eksekutif dan sebaliknya akan membawa nama buruk kepada sistem kerajaan yang menjamin perasingan kuasa di antara tiga komponen utama, *vis-à-vis*, Eksekutif, Perundangan dan Kehakiman.

(2) Berdasarkan fakta, pengagihan Peruntukan Khas Kawasan merupakan satu perkara polisi yang tidak berada di dalam bidang kuasa mahkamah. Mahkamah tidak mempunyai kedudukan untuk menilai kelayakan permohonan Peruntukan Khas Kawasan dan menentukan atau memutuskan polisi yang dibuat oleh Eksekutif. Mahkamah ini telah mengambil kira fakta bahawa polisi-polisi kerajaan bermula selepas mempertimbangkan beberapa faktor teknikal yang selalunya tidak berkaitan dengan undang-undang, dan hakim tidak mempunyai maklumat dan kemahiran yang diperlukan untuk menilai faktor-faktor yang tidak berkaitan dengan undang-undang sebegitu dan menyampaikan penghakiman berkenaan kesesuaian sesuatu polisi.

(3) Responden kedua telah dengan jelas memberi penjelasan berkenaan kenapa beliau membuat keputusan sepertimana yang dibuat berkenaan pengagihan Peruntukan Khas Kawasan bagi kawasan Sungai Siput. Jelas, apa yang diputuskan oleh responden kedua bergantung kepada perkara-perkara yang berkaitan dengan polisi dan oleh itu, mahkamah mengenepikan dirinya daripada memasuki bidang kuasa yang dimiliki oleh Eksekutif. Tambahan, dokumen-dokumen sokongan yang dieksibit oleh perayu jelas menunjukkan bahawa perayu tidak mempunyai kes yang boleh dipertahankan.

(4) Keputusan atau pelaksanaan budi bicara yang dipohon untuk disemak di bawah semakan kehakiman berdasarkan pertimbangan polisi atau pengurusan prerogatif boleh diputuskan pada peringkat kebenaran. Ianya bukan satu syarat bahawa mahkamah hanya mesti memutuskan sesuatu isu itu selepas mendengar kesemua keterangan substantif usul semasa bagi semakan kehakiman. Tambahan, keadilan keputusan sebegitu bergantung kepada fakta sesuatu kes. Berdasarkan fakta, isu-isu yang dibangkitkan dalam notis usul bagi kebenaran tidak boleh disemak secara kehakiman dan oleh itu, tidak boleh diadili.

Case(s) referred to:

Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh & Ors [2012] 1 CLJ 1 SC ***(refd)***

Council of Civil Service Unions v. Minister for Civil Services [1985] 1 AC 374 ***(refd)***

Government of Malaysia & Ors v. Loh Wai Kong [1979] 2 LNS 22 FC ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Laker Airways Ltd v. Department of Trade [1977] 1 QB 643 ***(refd)***

Petrolium Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

R v. Criminal Injuries Compensation Board, ex parte Lain [1967] 2 All ER 770 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 53

Other source(s) referred to:

MP Jain & SN Jain, *Principles of Administrative Law*, 6th edn, p 1069

For the appellant - Ambiga Sreenevasan (Mahaletchimi Balakrishnan with her); M/s Sreenevasan

For the respondent - Narkunavathy Sunderason (Naatra Idris with her, SFCs); AG's Chambers

[Editor's note: For the Court of Appeal judgment, please see Peguam Negara Malaysia v. Dr Micheal Jeyakumar Devaraj [2011] 9 CLJ 645]

Reported by Kumitha Abd Majid

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal on 10 October 2011, which allowed the Attorney General's appeal against the decision of the High Court. The High Court had on 28 February 2011 dismissed the Attorney General's objection to the respondent's application for leave to file an application for judicial review under O. 53 of the Rules of the High Court 1980 ("RHC").

[2] Leave to appeal was granted by this court on 8 March 2012 and the questions framed for determination of this appeal are:

Question 1

Whether an allegation that the decision or exercise of discretion sought to be reviewed under judicial review is based on policy consideration or management prerogative ought to be determined on an application for leave for judicial review, or whether the issue ought to be determined by the court after hearing all the evidence at the substantive motion for judicial review.

Question 2

Whether a decision is alleged to be based on policy consideration or management prerogative ("non-statutory discretion") is *ex facie non justiciable*, or whether the justiciability of such a decision is dependent on the existence, nature and extent of the non statutory discretion and on the particulars facts of each case.

Background Facts

[3] The appellant is the Member of Parliament ("MP") for the Sungai Siput constituency in the State of Perak. Before the High Court, the appellant had applied for leave for judicial review under O. 53 of the RHC, to challenge the decision of the Director-General of the Implementation Coordination Unit of the Prime Minister's Department ("1st respondent"), the Director of the Perak State Development Office ("2nd respondent") and the Government of Malaysia ("3rd respondent") with regards to allocation of public monies known as the Special Constituency Allocation from the Federal Consolidated Funds in particular to Sungai Siput constituency.

[4] The facts leading to the application are these. On 9 July 2010, the appellant wrote to the 2nd respondent applying for funds from the special allocation for the year 2010 for various projects and activities and purchases of equipments for schools, association and communities in the Sungai Siput constituency. The appellant stated in his letter that the projects and activities applied for, fall within the situations for which funding will be and has been approved according to the 1st respondent's website, the written response by the Prime Minister's Department in Parliament and the 2nd respondent's letter dated 19 October 2009.

[5] The funds applied for in the 2010 application were as follows:

(a) For victims of natural disasters (to be kept in the district office)	RM50,000
(b) SMJK Shin Chung	RM25,000
(c) SJK Methodist	RM25,000
(d) Nurul Ihsan Orpanage	RM50,000
(e) SJK (T) Mahatma Ghandi Kalaalai	RM25,000
(f) SJK(T) Ladang Dovenby	RM25,000
(g) SRJK(C) Shing Chung	RM25,000
(h) Sg Buloh Old Folks' Home	RM25,000
(i) Sg Siput-Kuala Kangsar Association For the Disabled	RM5,000
(j) Small Projects For Traditional Villages	RM160,000
(k) Meetings with youth in recreational parks and villages	RM5,000
(l) Anbu Nilayam Child Care Center (for single mothers)	RM30,000
(m) Small projects for Orang Asli	RM200,000

[6] The 2nd respondent by a letter dated 26 July 2010 informed the appellant that:

6.1 as of 25 July 2010, 56 projects valued at RM1.72 million had been approved for Sungai Siput, nine of which valued at RM1.15 million were being implemented, while 47 projects valued at RM561,865.15 had been completed;

6.2 the appellant's application for RM50,000 for victims of natural disasters to be deposited in the Land Office, cannot be considered because there was no allocation for that purpose. It was suggested that the appellant submits the list of victims concerned together with police report for consideration, so that there would be no overlapping with contributions from other Government agencies, and

6.3 as to the appellant's proposal for funding the relevant Parent-Teachers Association (PTA) and other bodies, the appellant was requested to submit a list of names of the PTA's and particulars of account details for the 2nd respondent's consideration.

[7] By a letter dated 24 August 2010, the appellant provided the details requested by the 2nd respondent (in para. 5.3) and sought the 2nd respondent's clarification about the approved projects.

[8] The 2nd respondent by a letter dated 12 October 2010 (written response) informed the appellant that:

8.1 The funds for the victims of natural disasters were rejected earlier by PPN Perak's letter dated 26 July 2010.

8.2 The contribution includes grants to organisation and societies such as the SMJK Shing Chung (National Type Secondary School) PTA Methodist School PTA and Nurul Ihsan Orphanage could not be considered as the funds were already approved in 2010 which included contributions to organizations and associations such as the Parent Teachers Associations of SMJK Shin Chung and SJK Methodist and Nurul Ihsan Orphanage. As the allocation was limited, parties that had received such contributions would not be considered.

8.3 As for allocations sought for various schools and organizations which would include SJK (T) Mahatma Gandhi Kalasalai, SJK (T) Ladang Dovenby, SRJK (C) Shing Chung, Sg Buluh Old Folks' Home, Sg Siput - Kuala Kangsar Association for the Disabled, Small Projects for traditional villages, Meetings with youth in recreational parks and villages, and Anbu Nilayam Child Care Center (for single mothers). The appellant was duly informed that the necessity of these proposed contributions would be assessed.

A 8.4 For minor projects in the Orang Asli villages, the appellant was advised to submit the application to the department of Orang Asli Affairs.

[9] Aggrieved by the written response, the appellant on B 29 October 2010 filed an application for leave to institute judicial review proceedings against the respondents seeking the following orders that:

9.1 a writ of "*quo warranto*" be issued against the respondents and each of them to show cause and give information as to C their authority to exercise, vest and/or delegate the discretion to approve and disburse funds from the Federal Consolidated Funds which are allocated in the Federal Budget 2010 and any annual Federal Budget to the Prime Minister's Department (as "Peruntukan Khas" or D "Peruntukan Khas Perdana Menteri untuk Kawasan Parlimen") for all parliamentary constituencies ("Special Constituency Allocation"), and to explain their respective roles and relationship in relation to one another;

E 9.2 an Order of *Mandamus* to compel the respondents and each of them to specify:

9.2.1 the kind of projects and activities for which application for funds from the Special Constituency Allocation will be granted; F

9.2.2 who can apply for funds from the Special Constituency Allocation;

9.2.3 all conditions and criteria taken into consideration by the respondents in granting funding applications for the G Special Constituency Allocation; and

9.2.4 the time limit within which decisions on applications for the Special Constituency Allocation will be made.

H 9.3 a declaration that, in accordance with art. 8(1) of the Federal Constitution, the Special Constituency Allocation must be provided and made available to all Members of Parliament equally, that the power and discretion vested in the respondents or any of them to approve applications for funds I from the Special Constituency Allocation must be exercised equally and equitably amongst all Members of Parliament and all categories of applicants, regardless of political affiliations, and that the same criteria or conditions must be applied in considering all such applications;

9.4 a declaration that the decision of the 2nd respondent set out in the 2nd respondent's letter dated 12 October 2010 or any part thereof is a breach of art. 8(1) of the Federal Constitution and as a result, unconstitutional and void;

9.5 an order of *certiorari* to quash the decision of the 2nd respondent as set out in the 2nd respondent's letter dated 12 October 2010 or any part thereof, and consequently:

9.5.1 an Order of *Mandamus* to compel the respondents or any of them to grant the applicant's application *vide* his letter dated 9 July 2010 to the 2nd respondent for funds from the Special Constituency Allocation for the Sungai Siput Parliamentary Constituency (P.62) for the year 2010, or

9.5.2 in the alternative, an Order of *Mandamus* to compel the respondents to exercise their discretion to grant applicant's application *vide* his letter dated 9 July 2010 to the 2nd respondent for funds from the Special Constituency Allocation for the Sungai Siput Parliamentary Constituency (P.62) for the year 2010 in accordance with the guidelines and practice specified pursuant to prayer 2 above and art. 8(1) of the Federal Constitution pursuant to prayer 3 above;

9.6 an Order of *Mandamus* to compel the respondents to specify:

9.6.1 all projects and activities for which application for funds from the Special Constituency Allocation has been granted since 2008 for the Sungai Siput Parliamentary Constituency (P.62);

9.6.2 the number of applications received, the persons or parties whose applications were approved and rejected and the persons or parties to whom the funds were disbursed for the applications that were approved *vis a vis* the Special Constituency Allocation since 2008 for the Sungai Siput Parliamentary Constituency (P.62); and

9.6.3 the time limits within which the applications for funds from the Special Constituency Allocation since 2008 for the Sungai Siput Parliamentary Constituency (P.62), were decided;

A 9.7 damages and/or punitive, aggravated and/or exemplary damages to be paid to the appellant by the respondents;

9.8 an inquiry and/or at the appellant's option an assessment of damages and/or punitive, aggravated and/or exemplary
B damages to be paid to the appellant by the respondents;

9.9 costs; and

9.10 all necessary and consequential relief, orders and/or directions.

C

[10] The Attorney General had objected to the leave application on the following grounds:

10.1 in respect of the prayer for a writ of *quo warranto*:

D 10.1.1 the relief was not suitable as the appellant was not challenging the appointment or qualification of either the 1st respondent or the 2nd respondent;

10.1.2 there were no facts or grounds in the appellant's
E application to sustain an application for that relief; and

10.1.3 the appellant was using that prerogative writ to elicit information from the 1st respondent and the 2nd
F respondent that he had already sought and obtained as a Member of Parliament for Sungai Siput;

10.2 in respect of the prayer for an Order of *Mandamus*:

10.2.1 the application did not comply with the provisions of
G Chapter VIII Part 2 of the Specific Relief Act 1950; and

10.2.2 such an application was tantamount to compelling the 2nd respondent to approve the appellant's
H application and therefore contrary to established principles of law;

10.3 in respect of the prayer for a declaration, that such an application was an abuse of the process of the court;

I 10.4 that the appellant's application involved policy consideration and the management prerogative of the 1st respondent and the 2nd respondent regarding the disbursement of the Special Constituency Allocation; and

10.5 that the court was not a suitable forum to arbitrate on a decision regarding the disbursement of the Special Constituency Allocation.

[11] On 28 February 2011, the learned High Court Judge, dismissed the objection by the Attorney General and allowed the appellant's application for leave to institute judicial review proceedings. The learned High Court Judge was of the view that a mere assertion that a matter was a management prerogative and therefore not reviewable by the court was insufficient to reject the appellant's application. Her Ladyship found that there were issues that go to the merits of the application which ought to be resolved at the hearing of the substantive motion.

[12] Aggrieved with the decision of the High Court, the Attorney General appealed to the Court of Appeal. On 10 October 2011, the Court of Appeal unanimously allowed the appeal and set aside the order of the High Court. The Court of Appeal was of the view that:

12.1 the appellant as a Member of Parliament had already sought and obtained in Parliament the relevant informations regarding the allocations sought and since the appellant was not challenging the qualification and appointment of the 1st respondent and the 2nd respondent or any legal flaw in their qualifications and appointments, the relief sought was outside the scope of a writ of *quo warranto*;

12.2 on the facts as set out by the appellant as found in the affidavit in support, there was a proper exercise of discretion by the 1st respondent and/or the 2nd respondent in rejecting the application sought by the appellant which was in line with policy consideration and management prerogative; and

12.3 the disbursement of the Special Constituency Allocations involved policy consideration and management prerogative; hence, the appellant's complaint was legally unsustainable and therefore not judicially reviewable.

Issues And Findings

[13] Based on the two questions of law posed to us, learned counsel for the appellant, Dato' Ambiga Sreenevasan submitted that though the decisions of the 1st respondent and/or 2nd respondent were alleged to be based on policy consideration or management prerogative, they were reviewable; and hence,

justiciable. In support thereof, she referred to the cases of *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 2 LNS 22, *Council of Civil Service Unions v. Minister for Civil Services* [1985] 1 AC 374, *R v. Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 All ER 770, *Laker Airways Ltd v. Department of Trade* [1977] 1 QB 643 and the recent Indian Supreme Court case of *Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh & Ors* [2012] 1 CLJ 1. She argued that at the very least the issue ought to be determined by the court after hearing all the evidence at the substantive motion for judicial review. She pointed out that the Court of Appeal's decision was made in the absence of any evidentiary support and was contrary to the prevailing law on the legal burden imposed on parties in a judicial review proceeding, as the said decision allowed the respondents to "escape" judicial review on a mere unsubstantiated allegation of "non justiciable prerogative", without needing to satisfy the legal burden on them to prove the same.

[14] The learned Senior Federal Counsel, Puan Narkunavathy maintained the Attorney General's position from the beginning that the reliefs sought by the appellant were non reviewable and non justiciable because they involved policy considerations which was the management prerogative of the 1st respondent and/or the 2nd respondent, where decisions involved were an exercise of discretion. In support thereof, she referred to the following cases of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; *Council of Civil Service Unions v. Minister of Civil Service (supra)* and *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11. She further submitted that the supporting documents exhibited by the appellant are sufficient evidence for the court to decide on the issues without needing the respondents to adduce further evidence.

[15] It was clear from the appellant's notice of motion that the issues before us relate to the decisions of the respondents with regard to the disbursement of the Special Constituency Allocation. The appellant contended that his application for 2010 Special Constituency Allocation for various projects, activities and purchase of equipment of school, association and communities in Sungai Siput were rejected by the 2nd respondent and in doing so the 1st respondent and/or the 2nd respondent had exercised his/their discretion wrongly. The question is, whether such exercise of discretion is amenable to judicial review.

[16] We have no hesitation in accepting that the executive's discretion, whether by statute or prerogative is amenable to judicial review. However, whether such discretion is amenable to judicial review is dependent on the facts of each case. (See *R Rama Chandran (Supra)*, *Kumpulan Perangsang Bhd (Supra)* and *Petrolium Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625. It was generally held in those cases that not every decision of the executive could be subjected to judicial review.

[17] In the instant case, the Court of Appeal in dealing with the issue held that:

> In our view, and as implied in the notice of motion, there can be no doubt that the approval and disbursement of the fund involves an exercise of discretion. The DG and/or the Director must evaluate the applications for the Allocations. These applications can only be decided by the DG and/or the Director in line with policy considerations and management prerogatives. The factual background did show that the appellants had approved the respondent's application amounting to RM1.72 million, while other applications are being given consideration. The Director has given practical suggestions to the respondent to channel relevant applications to relevant Government agencies. In the process of evaluation, the DG and/or the Director must comprehensively balance and safeguard the disbursement of the Allocation, consistent with Government policy and guidelines. Our courts do not possess the knowledge of policy considerations that underlie the decisions pursuant to the DG and/or the Director's evaluation.

[18] We are in complete agreement with the above view. We would like to add that the disbursement of the Special Constituency Allocation is a policy matter which is not within the purview of the courts. It is our view that the courts is in no position to evaluate the qualifications in the application for the Special Constituency Allocation and to determine or decide on the policy made by the executive. We have to take cognizance of the fact that government policies emanate after consideration of a number of technical factors which are often non legal; and judges do not possess the necessary information and expertise to evaluate these non legal factors and to pass judgment on the appropriateness or adequacy of a particular policy.

[19] In this regard, we would quote the relevant passages of the renown authors, MP Jain and SN Jain from their book entitled *Principles of Administrative Law* 6th edn., at p. 1069:

> It is not normally within the domain of any court to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying

A or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitution, statutory or any provision of law. When the government forms its policy it is based on a number of circumstance on facts, law, including constraints based on these resources. It is also based on its expert opinion. It would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The court would dissuade itself from entering into this realm which belongs to the executive.(see *State of Punjab v. Ram Lubhaya Bagga*, AIR 1998 SC 1703). On matters affecting policy and requiring technical expertise, the court would leave the matter for decision of those who are qualified to address this issue. Unless the policy or action is inconsistent with the constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters. (see *Federation of Railway Officers Assn v. UOI*, AIR 2003 SC 1344).

[20] In the present case, the 2nd respondent had clearly explained, why he decided the way he did with regard to the distribution of the Special Constituency Allocation for the Sungai Siput Constituency. Clearly, what was decided by the 2nd respondent hinged on matters relating to policy and thus we would dissuade ourselves from entering into the realm which belongs to the executive. Courts must be wary of unduly extending its judicial arms to policy matters which are exclusively within the domain of the executive. Unwarranted usurpation and transgression by the judiciary into the realm of the executive and *vice versa* will bring about disrepute to our system of government which upholds the separation of powers between the three main components *vis a vis* the executive, the legislature and the judiciary.

[21] Of course, in appropriate cases the courts as the custodian of law and justice must not remain idle. Where the policy or action of the executive is inconsistent with the Constitution and the law or in any manner arbitrary, irrational or there are elements of *mala fides* and abuse of power, the court is duty bound to interfere. Whether or not the court should interfere clearly depends on the facts and circumstances of each case. On the facts and circumstance of this case we are inclined to agree with the Court of Appeal that the decision of the 1st respondent and/or 2nd respondent is not amenable to judicial review.

[22] We are also in agreement with the Court of Appeal that, the issue of whether the decision of the 1st respondent and/or 2nd respondent is amenable to judicial review could be decided at the leave stage. Like the Court of Appeal we are not persuaded with

the appellant's contention that the issue should only be decided at the substantive stage. Our view is that no further evidence is necessary in this case, as rightly pointed by the learned Senior Federal Counsel, the supporting documents exhibited by the appellant which include information from the Prime Minister's Department's webpage of the 1st respondent's activities and the questions and answers regarding the Special Constituency Allocation in Parliament are sufficient material for the court to decide on the issue.

[23] With respect, we see no purpose for the High Court to grant leave just for the purpose of investigation on a full *inter parties* basis, when the supporting documents exhibited by the appellant clearly show that the appellant has no arguable case. Hence, the Court of Appeal was right to set aside the order of the High Court in granting leave to institute judicial review proceedings. We are of the same view with the Court of Appeal that leave to institute judicial review proceedings ought not to have been granted by the High Court in this case.

[24] Thus, our answers to the two questions posed to us are very much dependent on the facts of each case. On the 1st question, we are of the view that the decision or exercise of discretion sought to be reviewed under judicial review based on policy consideration or management prerogative may be determined at the leave stage itself. It is not a requirement that the court must only decide on the issue after hearing all the evidence at the substantive motion for judicial review.

[25] As to the 2nd question, the justiciability of such decision is dependent on the particular facts of the case. On the facts of this case, we agree with the Court of Appeal that the issues raised in the notice of motion for leave were not judicially reviewable and hence not justifiable.

[26] For the foregoing reasons the appeal is dismissed. As agreed by parties we make no order as to costs.